

March 10, 2000

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L98G0056**

PALMER COKING COAL – HYDE GRAVEL PIT EXPANSION

Appeal of SEPA Threshold Determination

Location On the Enumclaw-Franklin Road, approximately 3 miles southeast of the City of Black Diamond

Applicant: Palmer Coking Coal Company, *represented by*
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Appellants: **Doreen Johnson** **Wade Higgins**
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King County: Department of Development and Environmental Services,
Land Use Services, SEPA Division, *represented by*
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SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Deny the appeal

EXAMINER PROCEEDINGS:

Hearing Opened: March 2, 2000
Hearing Closed: March 3, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Grading
- Gravel
- Lakes
- Rivers and streams
- Springs
- Groundwater
- Wildlife protection: salmon/anadromous fish

SUMMARY:

Denies appeal from MDNS regarding sand and gravel grading permit.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. **Proposal.** Palmer Coking Coal (the “Applicant”) proposes to expand a gravel mining operation to allow removal of approximately 700,000 cubic yards of sand and gravel over a 10 to 20 year period. These materials would be removed from a 22 acre site located immediately abutting the south boundary of the Wheeler Topsoil facility. The Property is located along the east boundary of the Enumclaw-Franklin Road approximately 3,000 feet southeast from the Green River.
2. **SEPA Threshold Determination.** On October 26, 1999, pursuant to its review of the requisite grading permit application, the Department issued a Mitigated Determination of Non-significance (MDNS). See Exhibit No. 2. That is, the Department published its determination that, based upon the relevant environmental documents, it concluded that no Environmental Impact Statement need be prepared to complete review of this project, *provided* that certain mitigating conditions were adopted. Those mitigating conditions include the following:
 - a. Proponent shall provide signs on Enumclaw-Franklin Road that prohibit the use of compression brakes between the ingress/egress of the mine and Highway 169. Proponent

shall contact appropriate state and local agencies with jurisdiction over road signage. The signs shall be designed and placed in accordance with rules and regulations governing such signage.

- b. Provisions shall be made for a wheel wash facility located immediately adjacent to the ingress/egress of the mine. The wheel wash facility design shall be submitted to DDES for review and approval. The wheel wash facility shall be used at the direction of DDES. Ongoing monitoring of road conditions will determine if or when the wheel wash will be utilized.

In addition, the Department noted in the MDNS that it expected the Applicant to comply with applicable King County codes including the Uniform Fire and Building Codes, Road Standards, Surface Water Design Manual and Sensitive Areas Regulations. The Department further noted that the 22 acre site would be mined in 5 acre segments with each segment being reclaimed after exhaustion of the material; that on-site operations will consist of excavation, screening, crushing and trucking of mineral aggregate materials; that no washing of the sand and gravel is proposed; that all storm water will be contained in a retention/detention facility located wholly within the mine site (thereby prohibiting storm water releases); and, that the Applicant shall post a cash bond in the amount of \$20,000 for accelerated pavement deterioration of approximately 2.5 miles of Enumclaw-Franklin Road.

3. **Appeals Filed.** On November 18 and 19, 1999, respectively, Doreen Johnson and Wade Higgins filed timely appeal. Arguing “significant errors of omission,” the Johnson appeal emphasizes the following concerns/issues/allegations:
 - a. Hydrology study was not required.
 - b. Significant public resources at risk were not evaluated; therefore, the SEPA documentation is inadequate and incomplete.
 - c. The MDNS is deficient in not adequately addressing the Endangered Species Act and the effects of the proposed pit expansion on Endangered Species Act (ESA) protected Chinook salmon and other salmon.
 - d. A new unclassified use permit should be required by King County rather than considering the proposal an “expansion.”

The Higgins’ appeal, through the review of area aquifer studies and his own geohydrology investigations, supports the first three points of the Johnson appeal.

4. **Hydrology Review.** Icy Creek springs is located between the pit site and the Green River. According to the Appellants, it is the largest springs in water volume in King County. Its aquifer recharge area is believed to be Fish Lake and/or Deep Lake and/or Hyde Lake. The Appellants argue that there is “a high chance” excavations into the hillside above the springs, as proposed in this application could intercept the underground flow and de-water the springs. The following findings are relevant:

- a. The Department keeps a geotechnical staff to review proposals such as the instant one. That staff conducted its own independent investigation and, further, reviewed the findings submitted by geotechnical engineers who studied the proposal on behalf of the Applicant. That DDES geotechnical staff, even after having heard all testimony, supports the findings of the geo-hydrologic analysis submitted by the Applicant.
- b. In its review the Department examined several environmental documents already on file, including the following:
 - Brown and Caldwell, March 1989 *Geo-hydrology Studies of the Metro Section 16 Silvigo Project* prepared for the Municipality of Metropolitan Seattle (Metro).
 - CH2M Hill, January, 1998 *Technical Information Report* prepared for Palmer Coking Coal Company
 - Metro, December, 1989, *Section 16 Silvigo Project*
 - CH2M Hill and Hong West Associates, October 9, 1991 *Section 16/20 Hydro-geologic Study Final Report* prepared for Metro
 - Request for determination of status: legal non-conforming use at historic mining site, dated August, 1994. This request contains additional studies as supporting documentation
- c. The Applicant's geotechnical and geologic engineers (Icicle Creek Engineers, Inc.), in preparing its analysis examined additional resources, including the following:
 - TCW Associates, HLA/Harper-Owes, and University of Washington College of Forest Resources, December, 1989, *Metro 16 Silvigo Project, Hydro-geology and Water Quality Evaluation* prepared for the Seattle-King County Health Department
 - John C. Dunton, P. G. Consulting Services, September 10, 1997, *Narrative for Department of Natural Resources for SM/8A Hyde Gravel Wheeler Extension Mine.*
 - John C. Dunton, P. G. Consulting Services, undated diagrams titled Segmental Reclamation Agreement
 - Washington State Department of Natural Resources (DNR), September 17, 1997, *Application for Surface Mining Permit (form SM-2).*

In addition, both the Applicant's geotechnical engineers and the Department's geotechnical engineer reviewed the extensive notes and observations provided to this hearing record by Appellant Higgins.

- d. Due to the pattern of bedrock in the vicinity, overlain by out wash/recessional sands and gravels, there are a number of small kettle lakes in the vicinity which provide natural regional aquifer elevation monitoring opportunities. The hearing record contains no analysis demonstrating that monitoring wells would be any more efficacious for this purpose. One such kettle lake, south from the subject property, does not conform to the regional aquifer pattern suggested in the Applicant's exhibits. The Applicant's geotechnical engineer disregards that lake due to immediate neighboring human disturbances to the landscape which diminish the probable dependability of that lake as a monitoring resource. Even if that lake were included in the aquifer locational analysis, it would require only minor adjustments to the subsurficial geologic contours.

- e. The expert analysis of record demonstrates that the regional groundwater is expected to be 20 feet below the lowest excavation elevation at the east boundary of the site. At the west boundary of the site, the regional groundwater aquifer is expected, based upon the above cited analyses, to be approximately 50 feet below the floor of the proposed final contours of the gravel pit. Thus, Icicle Engineers conclude (and DDES geotechnical reviewers agree) no interception of the regional groundwater or de-watering of that aquifer will occur. The Department's geotechnical reviewer recommends, and the Applicant agrees, to require that the Applicant at all times maintain an exploratory monitoring hole dug on site to an elevation 10 feet below the then-current extraction pit floor. The grading permit conditions of approval and operation would, of course, prohibit mining activity any deeper if groundwater were encountered. The Appellants disagree with this approach and argue, instead, for additional hydrology study.
5. **Significant Public Resources.** The regional aquifer of concern in this review is the sole source water supply for the State Department of Fish and Wildlife "Pautzke Pond" Chinook salmon facility approximately 3,000 feet from the subject property. The same regional aquifer serves as a domestic water source for the City of Black Diamond. Icy Creek, the Appellants observe, "provides significant quantities of water" to the in-stream flow of the Green River. The Appellants argue that the proposed mining activity puts these public resources at risk by introducing a potential for "de-watering" Icy Creek or the domestic wells. The following findings are relevant:
- a. The City of Black Diamond considered intervening in this appeal review. Having once studied the entire matter, the City of Black Diamond chose not to intervene (letter from Jason Paulson to the Examiner, dated January 25, 2000). The City requested the Department to prohibit on-site storage of fuels or liquid lubricants; to require a spill prevention and response plan; to require security measures; to prohibit mining within the water table aquifer; and, to require dedicated monitoring wells in the event of "future expansion." The Department grading review staff proposes numerous conditions directed toward these concerns. See Exhibit No. 21. The hearing record contains no evidence that the proposed mining activity, as regulated by the grading conditions and the MDNS, would fail to meet the expectations of the City of Black Diamond.
 - b. The Washington State Department of Fish and Wildlife likewise recommends various protective controls: groundwater monitoring; effective spill prevention and clean-up program; and reclamation. The Department of Fish and Wildlife recommends that a wildlife habitat component to the reclamation plan be required. Such information will be useful to the State Department of Natural Resource, the agency responsible for reviewing reclamation plans. The hearing record contains no evidence that the measures required by the Department through the grading permit conditions (Exhibit No. 21) and the MDNS will be insufficient to meet the concerns expressed by the Department of Fish and Wildlife. Stephen Conroy, Ph.D., fisheries specialist for the Department, reviewed the proposal and concluded that—based on the geotechnical analysis—fisheries resources would not be threatened by the proposed mining activity.

6. **Icy Creek “de-watering”.** The Appellants argue that ESA designated endangered species (salmon) will be risked by “potential de-watering of Icy Creek.” The hearing record contains no analysis, explanation or demonstration of the mechanism by which de-watering might occur. The hearing record demonstrates convincingly that the mining floor will not intrude into the aquifer. At all times the Applicant will be required to have a monitoring pit dug 10 feet below any current mine floor. See also Finding No. 5, preceding.
7. **“Grandfather Rights.”** The Appellants argue that a new unclassified use permit should be required by King County rather than considering the proposal an “expansion” of a legal non-conforming use. The Appellant observes that the area of concern includes 60 to 80-year old Douglas Fir. How then, the Appellant asks, can this activity be regarded by the Department as a continuation of an existing activity? The following findings are relevant:
 - a. The King County Comprehensive Plan designates the subject property as an existing non-conforming use committed to mineral extraction.
 - b. In 1995, the Department conducted a formal review of the non-conforming status of the property. The Department’s review concluded that the two tax parcels of concern here did indeed meet County standards for legal non-conforming status for a mineral extraction. See Exhibit No. 7.
 - c. Both the Department’s Site Development Review staff and Geotechnical staff agree that the substantive controls addressing environmental impact would be no different were an unclassified use permit to be required in this case. Testimony, West and White.
8. **Standard of Review.** Section D of the Division’s March 2, 2000 report to the King County Hearing Examiner (Exhibit No. 1) cites the scope and standard of review to be considered by the Examiner. The Division’s summary is correct and will be used here. In addition, the following review standards apply:

WAC 197-11-350(1), -330(1)(c), and -660(1)(3). Each authorize the lead agency (in this case, the Environmental Division), when making threshold determinations, to consider mitigating measures that the agency or applicant will implement or mitigating measures which other agencies (whether local, state or federal) would require and enforce for mitigation of an identified significant impact.

RCW 43.21C.075(3)(d) and KCC 20.44.120 each require that the decision of the Responsible Official shall be entitled to “substantial weight”. Having reviewed this “substantial weight” rule, the Washington Supreme Court in Norway Hill Preservation Association v. King County, 87 Wn 2d 267 (1976), determined that the standard of review of any agency “negative threshold determination” is whether the action is “clearly erroneous”. Consequently, the administrative decision should be modified or reversed if it is:
9. Any portion of any of the following conclusions that may be construed as a finding is incorporated here by this reference.

1. *The burden of proof falls on the Appellant in a threshold determination appeal.* The Appellants argue that the Department's environmental review, which relies substantially upon the Icicle Creek Engineers, Inc., review, is unsupported by sufficient measured data. In other words, the Appellants argue that the Department/Icicle Engineering conclusions are speculative. However, having reviewed the entire hearing record, it must be concluded that the Appellants' case is based upon unfounded speculation. Considering the preponderance of the evidence, the Appellants have not successfully borne their burden of proof. Considering the above findings of fact and the entire hearing record, it must be concluded that the Department's threshold determination in this matter is not clearly erroneous and therefore cannot be reversed.
2. The presentation of issues, questions and concerns is not sufficient to overturn a threshold determination. Rather, the determination (and the appeal review of that determination) must be based upon the preponderance of the evidence. The preponderance of the evidence in this case supports the Department's determination.
3. The issues raised by the Appellant are valid reasons for concern. However, the concerns raised by the Appellants do not come as a surprise to the reviewers. Indeed the application has been subjected to substantial analysis and review by the Department. The Department has not been unaware of the concerns raised by the Appellants. In fact, the Department raised those same concerns and required additional geotechnical investigation and analysis addressing those concerns before issuing the MDNS. The Department, participating in this appeal review, upon hearing and viewing the entire hearing record and having consulted with its geotechnical staff, affirmed its initial MDNS. In the final analysis, the Department concluded that the conditions of approval to be applied to this proposed development adequately address the concerns whereas the Appellants do not so conclude. As noted above, the presentation of issues, questions and concerns is not sufficient to overturn a threshold determination.
4. The record contains no evidence that an unclassified use permit or special use permit would result in any different analysis or conditions of approval or mitigation measures than the present action. The record indicates that the property is designated as legal non-conforming use by the King County Comprehensive Plan. Thus, it cannot be concluded, regarding the substantial issues of this appeal, that the zoning conformity decisions of the Department were in error or that they affected the assessment of probable significant impacts. See Finding No. 7.
5. In addition, the following conclusions apply:
 - a. There is no indication in the record that the Division erred in its procedures as it came to its threshold declaration of non-significance. Rather, the Appellant differs with the Department's assessment of impacts or the *probability* of potentially adverse impacts. Speculation with respect to *potential* impacts cannot prove a probable significant impact that requires the responsible agency to be overruled or to alter its initial determination.
 - b. Although the Appellant argues that the information on which the Department based its determination was insufficient, there is no adequate demonstration that

the information on which the Division based its determination is actually

- c. There is a substantial amount of information in the record regarding the various impacts which have been asserted by the Appellant. The Department has not been unaware of these issues and has investigated (and reinvestigated) them, but has arrived at conclusions which differ from the Appellant's. The Department, having had access to the variety of issues and points of view and information expressed by the Appellant and others, maintains its original determination of non-significance. The Department's judgement in this case must be given substantial weight.
- d. In view of the entire record as submitted and in view of the State Environmental Policy Act, the Department's decision is not clearly erroneous and is supported by the evidence.

ORDERED this 10th day of March, 2000.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 10th day of March, 2000, to the following parties and interested persons:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE MARCH 2 AND 3, 2000 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L98G0056 – PALMER COKING COAL/HYDE EXTRACTION:

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Angelica Velasquez, Larry West, Ramon Locsin, Stephen Conroy and Fred White. Participating in the hearing and representing the Applicant were Joel Haggard and William Kombol. Participating in the hearing and representing the Appellants were Doreen Johnson, Howard Johnson and Wade Higgins. Other participants in this hearing were Kurt Beardslee, Patricia Sumption and Brian Beaman.

The following exhibits (1-10) were offered and entered into the record by the Department of Development and Environmental Services:

- Exhibit No. 1 DDES Report to the Hearing Examiner, dated March 2, 2000
- Exhibit No. 2 Mitigated Determination of Non-significance (MDNS) for Palmer Coking Coal Hyde Gravel Pit Expansion (L98G0056) published on October 26, 1999
- Exhibit No. 3 Environmental Checklist dated June 10, 1997
- Exhibit No. 4 Appeal of MDNS for Hyde Gravel Pit Expansion by Doreen Johnson received November 18, 1999
- Exhibit No. 5 Appeal of MDNS for Hyde Gravel Pit Expansion by Wade Higgins received November 19, 1999
- Exhibit No. 6 Grading plans (undated) for the proposed project. Plans include a pre-mining topographic map, final reclamation contour map and cross section map.
- Exhibit No. 7 LUSD Manager's Report and Decision on Nonconforming Status, dated January 11, 1995
- Exhibit No. 8 Hydrogeologic Consultation and Response to MDNS Appeal Comments prepared by Icicle Creek Engineers, dated February 16, 2000
- Exhibit No. 9a Affidavit of Evan D. Morris, Sr., notary dated July 6, 1997
- Exhibit No. 9b Affidavit of Carl G. Falk, notary dated August 27, 1994
- Exhibit No. 10 Hearing Examiner's Report and Decision on SEPA appeal of Wheeler Topsoil, dated December 9, 1992.

The following exhibits (11-12e) were offered and entered into the record by Appellant Doreen Johnson:

- Exhibit No. 11 Photographic exhibit submitted by Doreen Johnson
- Exhibit No. 12a Department of Fish and Wildlife letter to Angelica Velasquez, dated January 28, 2000
- Exhibit No. 12b Salmon Recovery Funding Board project application with cover letter dated February 24, 2000
- Exhibit No. 12c Washington State Parks and Recreation Commission letter dated April 18, 1997, with two attachments (undated) and cover letter, dated February 24, 2000

- Exhibit No. 12d. Department of Ecology letter to Angelica Velasquez, dated February 8, 2000
Exhibit No. 12e. Resumes of Doreen Johnson, Washington Trout Executive Director Kurt Beardslee, Johnson and Patricia Sumption.

The following exhibits (13a-13j) were offered and entered into the record by Appellant Wade Higgins:

- Exhibit No. 13a. Graph of Aquifer Susceptability
Exhibit No. 13b. Basin Map
Exhibit No. 13c. Icy Creek Temperature
Exhibit No. 13d. USGS Temperature Summary
Exhibit No. 13f. Geologic connection map by Luzier, 1969
Exhibit No. 13g. Streamflow graphs of Icy Creek
Exhibit No. 13h. Photographs with map showing locations
Exhibit No. 13i. Cross-section of Icy Creek
Exhibit No. 13j. Description of hydrostratographic models
Exhibit No. 14. Written testimony of Joseph Stone, South King County Chapter of Northwest Steelhead and Salmon, Council of Trout Unlimited, dated February 22, 2000
Exhibit No. 15. City of Black Diamond letter to Hearing Examiner Titus, dated January 25, 2000
Exhibit No. 16. Oren and Mary Isham letter to Hearing Examiner Titus, dated February 13, 2000
Exhibit No. 17. Map of proposed excavation site and surrounding properties (with proposed site highlighted in yellow)
Exhibit No. 18. Preliminary grading permit conditions authored by Mr. Locsin, 9 pages

The following exhibits (19a-20) were offered and entered into the record by Applicant Palmer Coking Coal:

- Exhibit No. 19a. Resumes for Kombol, Beaman and Dunton
Exhibit No. 19b. Projects Information (4 pp., including 2 photos)
Exhibit No. 19c. DNR Award
Exhibit No. 19d. Hydrologic Summary Letter (dated February 16, 2000) by Beaman
Exhibit No. 19e. Aerial Photo (1997)
Exhibit No. 19f. Photo of reclaimed land
Exhibit No. 19g. Photo of glacial deposit soils
Exhibit No. 19h. Photo of Icy Creek (2,550 ft. elevation)
Exhibit No. 19i. Photo of glacial "kettle"
Exhibit No. 19j. Photo of abandoned silica mine
Exhibit No. 19k. Photo of existing Wheeler Pit (looking south)
Exhibit No. 19l. Photo of existing Wheeler Pit (looking southwest)
Exhibit No. 19m. Photos of Wheeler Pit and north side of subject site
Exhibit No. 19n. Photos looking to site from road
Exhibit No. 20. Figures 2, 3, 4 and 5, excerpted from Exhibit No. 8
Exhibit No. 21. Permit Approval Conditions Document, Clearing and Grading Review, Tracking No. L98G0056 dated October 20, 1999 (described as preliminary in testimony)